No. 470

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 470

ABBATE BROTHERS, INC., ET AL.,
Appellants,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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The City of Chicago, a Municipal Corporation, appellee in the above-entitled cause, for its statement in opposition to appellants' statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I.

Statement of Issues on Appeal.

The question sought to be presented in this Appeal is appellants' claim that an ordinance of the City of Chicago requiring the installation of safety devices on elevators is contrary to and in violation of the Fifth and Fourteenth

Amendments to the Constitution. Appellants contend that enforcement of the ordinance constitutes a deprivation of property without due process of law. The effect of installing the safety device required would be to prevent operation of the elevators unless the elevator doors were closed and it would be impossible to open the elevator door unless the car was at the floor level (Jurisdictional Statement, p. 16).

Appellee argued that the ordinance was clearly constitutional and the court below held that it was valid. The court below said (11 Ill. 2d 345; Jurisdictional Statement, p. 16):

> "Based upon advances in engineering, and no doubt upon experience gained during the thirty years appellees' elevators have been in operation, the city has determined that the greatest protection to human life is to be realized by door interlocks which will prevent the operation of elevators unless hatchway gates are closed, and permit the gates to open only when the elevator car is at gate level. In requiring all power elevators to be so equipped the city has done no more than to exercise its continuing power to make regulations needful to the common good and general welfare, subject to which all property is held."

The issue presented to this Court, therefore, is whether a municipality in the exercise of its police power and acting for the common good and general welfare in protecting human life and safety, may enact an ordinance requiring safety devices on elevators which have operated for some thirty years, during which time engineering advances have demonstrated that door interlocks preventing the operation of such elevators unless entrances thereto are closed and permitting the elevator gates to open only when the elevator car is at gate level, are necessary to prevent injury or death.

II.

No Substantial Federal Question Is Presented by the Attempted Appeal.

Appellants rely on the following cases to sustain the jurisdiction of this Court:

King Mfg. Co. v. *Augusta*, 277 U. S. 100, 72 L. ed. 801, 48 S. Ct. 489 (1928);

Jamieson v. *Texas*, 318 U. S. 413, 87 L. ed. 869, 62 S. Ct. 669 (1943);

Poulos v. *New Hampshire*, 345 U. S. 395, 97 L. ed. 1005, 73 S. Ct. 760 (1953).

None of these cases serve to sustain jurisdiction. Appellants have misconceived the issue. We are here concerned with the retrospective application of an ordinance to existing buildings. The cited cases are not concerned with this issue. They merely stand for the principle that a municipal ordinance is within the meaning of "statute" as set forth in 28 U. S. C. 1257 (2) We have never gainsaid this and it never was an issue in this proceeding.

The *King Mfg. Co.* case involved a suit to enjoin enforcement of an ordinance of the City of Augusta fixing rates for water power. The objection urged was that the ordinance was repugnant to the impairment of contract clause of the Constitution. The *Jamieson* case dealt with an ordinance which prohibited distribution of handbills. Members of Jehovah's Witnesses brought suit claiming that the ordinance violated constitutional inhibitions against infringement of free speech. The *Poulos* case was concerned with an ordinance which forbade religious meetings in public parks without a license. Members of Jehovah's Witnesses contended that the ordinance violated constitutional guarantees of free speech. None of the cases upon which appellants rely in their jurisdictional statement deal with an ordinance in any way similar

to the one involved in the case at bar. Such cases only stand for the proposition that a municipal ordinance is equivalent to a statute or a law which this Court will consider under its appellate jurisdiction. We have never denied this. However, the proposition of law that a municipal ordinance is inclusive in the term "statute" as stated in 28 U. S. C. 1257 (2) does not sustain appellants' contention that an ordinance having a direct relationship to the public safety and welfare is violative of the Fifth and Fourteenth Amendments of the Constitution of the United States.

Inasmuch as the cases upon which appellants rely in the jurisdictional statement are completely irrelevant to the issue here, this Court should reject their attempted appeal.

In asserting that the questions are substantial (Jurisdictional Statement, pp. 6-8), appellants resort to vague and indefinite generalities which in no manner indicate that there are substantial questions for this Court to consider. Not a single authority is cited to sustain appellants' position. In their Index, appellants have failed to list any cases or text references. They have omitted statutory enactments so that, as far as this Court is concerned, there is no law, statute or ordinance involved. Therefore, there is no constitutional question for this Court to resolve.

Appellants take the astounding position that the safety device required by the ordinance is unimportant to the public welfare. They infer that the City of Chicago enacted the ordinance to compel property owners to purchase safety devices which are of no merit. Appellants have the audacity to state (Jurisdictional Statement, p. 8):

> "The sole beneficiary will be the purely private interest of the promoters of the device."

Thus, appellants are in the position of accusing a legislative body of enacting an ordinance for the sole benefit of private interests. Nowhere in the record of this cause was such an outrageous thing suggested. It is now made to persuade this Court to accept this appeal without any basis in fact for such an unfounded accusation.

Appellants further say (Jurisdictional Statement, p. 8) that the State of Illinois, acting through the defendant municipality, has told them that they cannot use their property: "unless they first make peace with the developers and vendors of the contrivance prescribed by the ordinance." This Court will note that, in addition to citing no authorities, appellants cite no record references to sustain any of these statements. The fact remains that the court below found that the elevators now being operated by appellants are brought to a halt by a rope which hangs about three feet from the front of the shaft; that the doors to the elevator shaft can be opened manually even though the elevator is not at the floor; that it is possible to reach into the shaft (some three feet) and control the operation of the elevator from any level regardless of the location of the elevator; that it is the practice of appellants' employees to leave the brake unlocked, thus permitting exterior operation from any level; and that, as a result, the car may be removed from a level without the knowledge of the employee who took it there, the open doors leave the shaft unguarded, and employees leaning in to reach the controls must maneuver in time to avoid the moving car (11 Ill. 2d 339-340; Jurisdictional Statement, p. 10). In the light of these findings by the court below, appellants now say that the legislative body of the City of Chicago "has not intervened here in behalf of the general public welfare" (Jurisdictional Statement, p. 8).

In summarizing its opinion the court below said (11 Ill. 2d 346; Jurisdictional Statement, p. 17):

> "We conclude, *even without adverting to the need for correcting the dangerous practices which attend the operation of appellees' elevators,* that the retrospective application of the ordinance is both a reasonable and proper exercise of the police power." (Emphasis added.)

We respectfully ask this Court to examine appellants' Jurisdictional Statement in conjunction with the opinion of the court below. Appellants have raised no questions which would justify bringing this matter to this Court. We believe appellants are using dilatory tactics for purpose of delay, during which time the dangerous practices clearly disclosed in the opinion of the court below will continue to the detriment of the public health and safety.

Appellants state (Jurisdictional Statement, p. 6) that this case is "a matter of first impression in this Court" because

> "Never, however, has this Court addressed itself to the propriety of requiring substantial alterations in an improvement lawfully erected and not accessible to the general public, where the legislature has acted, not to ameliorate a demonstrated peril, but solely upon the basis of a technological advance which has been developed subsequent to the erection of the structure."

Contrary to appellants' statement, the elevators were "accessible to the general public." Thomas E. Martin, the elevator inspector for the city, testified that he observed customers using the elevators (Rec. 332-337). Philip Lamantia, one of the appellants, testified that occasionally he has observed someone using the elevators who is not connected with his firm (Rec. 528-529). Gus Economos, one of the appellants, testified that the garbage man uses the elevator (Rec. 591-592).

Furthermore, appelalnts do not deny that the "hustlers", who operate the elevators (Jurisdictional Statement, p. 4), could and do operate them in a manner which could cause injury to themselves and others (11 Ill. 2d 339-340; Jurisdictional Statement, p. 10).

Appellants argue that the hustlers and others using the elevators do not constitute members of the "public". The safety device required by the ordinance is for the benefit of all who use the elevators. There are no exceptions.

Appellants' statement that "the legislature has acted * * * solely upon the basis of a technological advance" and not for the public health and safety is negatived by the finding of the court below (11 Ill. 2d 342; Jurisdictional Statement, p. 13):

> "Nothing in the record supports the charge that the amendatory paragraph added in 1956 was for any purpose other than a legitimate exercise of the police power directed at protecting human life."

We submit that the installation of safety devices on elevators to prevent injury or death to the users thereof certainly bears a substantial relationship to the public health and safety. The users of the elevators, be they the hustlers, the employees, the owners or others, constitute a part of the "public" and are entitled to the protection afforded by the ordinances in question.

In stating what they conceive to be the questions presented by this attempted appeal, appellants charge that "no grounds are advanced for any belief that the operation has become more hazardous" (Jurisdictional Statement, p. 3). This ignores the statement of the court below that the operation of these elevators for some thirty years has led to a situation where improvement must be made (11 Ill. 2d 345-346; Jurisdictional Statement, p. 16). The time is gone when elevators can be operated by leaning into an elevator shaft and manipulating ropes and cords by hand to move and halt the elevators.

Appellants also refer to "substantial alterations in the structure" in their statement of questions presented by the attempted appeal (Jurisdictional Statement, p. 3). This is a deliberate effort to mislead this Court. No "substantial alterations" are required. Appellants have only to install safety devices on their existing elevators to comply with the ordinance. The effect of such devices will be to prevent operation of the elevators unless all doors leading into the shaft are closed. No door can be opened unless the car is at the floor level. Surely, this does not constitute "substantial alterations." True, if appellants elect to install automatic elevators, more work will be required. But no alterations need be made. It will only be necessary to convert the existing elevators into automatic elevators. The same shafts can be used and no alterations whatsoever will be required.

The only case to which appellants refer in their jurisdictional statement is *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 90 L. ed. 1096 (1946), from which the court below quoted in its opinion. Appellants state (Jurisdictional Statement, p. 5) that the Supreme Court of Illinois cited the *Queenside Hills Realty Co.* case as follows:

> "Little need be said on the due process question . . . in no case does the owner of property acquire immunity against the exercise of the police power because he constructed it in full compliance with the existing laws."

Appellants have quoted only the first sentence and last sentence of the quotation, omitting the numerous sentences intervening which give sense and meaning to the opinion of the court below. In discussing the *Queenside Hills Realty Co.* case, the court below said (11 Ill. 2d 344-345; Jurisdictional Statement, pp. 15-16):

> "Similar sentiments were expressed by our nation's highest court in *Queenside Hills Realty Co.* v. *Saxl*,

328 U. S. 80, 90 L. ed. 1096, where a New York law requiring the installation of sprinkler systems in existing lodging houses of nonfireproof construction was held constitutional. The court said: 'Little need be said on the due process question. We are not concerned with the wisdom of this legislation or the need for it. (Citation.) Protection of the safety of persons is one of the traditional uses of the police power of the States. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. * * * But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws.' 328 U. S. at pp. 82-83, 90 L. ed. at p. 1098."

From the foregoing quote it is apparent that the opinion of the court below is in complete conformity with the views of this Court as expressed in the *Queenside Hills Realty Co.* case.

The court below held that ordinances similar to the one here involved were a valid exercise of the police power (109 A. L. R. 1117; 62 C. J. S., Mun. Corp. sec. 149; *Clarke* v. *City of Chicago*, 159 Ill. App. 20; *City of Chicago* v. *Washington Home of Chicago*, 289 Ill. 206; *O'Donnell* v. *Barach*, 1 Ill. App. 2d 157; *Doran* v. *Boston Store of Chicago*, 307 Ill. App. 456; *DeWolf* v. *Marshall Field & Co.*, 201 Ill. App. 542; *Adamec* v. *Post*, 273 N. Y. 250, 7 N. E. 2d 120; *City of Seattle* v. *Hinckley*, 40 Wash. 468, 82 P. 747).

Appellants do not discuss or attempt to distinguish any of the cases relied on by the court below in reaching its conclusion that the ordinance requiring the installation of safety devices on existing elevators is not unconstitutional. This, in our opinion, is appellants' admission that the opinion of the court below properly states the law, and that there are not substantial constitutional or federal questions involved which would justify the granting of this appeal.

Conclusion.

It is respectfully submitted that the provisions of the ordinance of the City of Chicago requiring the installation of safety devices on elevators is clearly a proper exercise of the police power. In the interests of human life and safety, the ordinance is applicable to existing buildings. The ordinance would be meaningless if applicable only to future construction as elevators of this antiquated type are no longer being installed anywhere in the country. Operation of elevators manually by manipulating cords and ropes is a dangerous and outmoded practice. Under its police power the municipality could well outlaw such elevators entirely and compel installation of modern equipment. They have not done so. They have merely required a safety device which will prevent movement of the elevators unless all doors to the shafts are closed and which will prohibit opening the door into the shaft unless the elevator is at the floor level. The cost of such installation is nominal.

We further submit that appellant should have proceeded by petition for certiorari, rather than by appeal, and we respectfully request that this Court consider the appeal as a petition for certiorari as the rules of court provide.

We further submit that that the questions presented in this appeal have long ago been so definitely determined that no substantial questions are presented by this appeal entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

We further submit that the cases which appellants have cited to sustain the jurisdiction of this Court are so remote from the issues here that they cannot possibly justify invoking the jurisdiction of this Court.

Wherefore, appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of Illinois be affirmed.

Respectfully submitted,

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